No. 14468

IN THE

United States Court of Appeals

For the Ninth Circuit

P. W. SIEBRAND and HIKO SIEBRAND, Doing Business as Siebrand Brothers Circus and Carnival,

Appellants,

vs

GEORGE F. GOSSNELL and Estella Gossnell, His Wife, Appellees,

and

S. J. CARROLL,

Appellant,

vs

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BRIEF OF APPELLEES

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BRIEF OF APPELLEES

Appeal from the United States District Court
for the District of Arizona

STATEMENT OF THE CASE

Appellees deem it necessary to aid the Court in determining the questions presented on appeal to supplement the Statement of the Case contained in Appellants' Opening Brief, in the following respects:

The appellees, for the sake of clearness, accept appellants designation of the parties, to-wit: P. W. Siebrand and Hiko Siebrand the appellants being referred to as "the defendants," and the appellees George F. Gosnell and Estella Gossnell being referrd to as "the plaintiffs." The appellant S. J. Carroll is referred to as "the truck driver."

John Boyd, a police officer, was immediately to the rear of the truck and trailer being operated by the truck driver as it was traversing the "Tempe Bridge" and with nothing to obstruct his view saw the trailer suddenly become disengaged from the truck towing it, and observed it suddenly veer left into plaintiffs' car. (T.R. 122, 123, and 124). The police officer asked the truck driver by whom he was employed and he said Siebrand Bros. Circus and Carnival. (T.R. 126, 127, and 138). He (the police officer) then examined the trailer hitch and found there was no safety chain or lock for the ball trailer hitch. (T.R. 127). The officer observed the hitch was not broken and that there had never been any lock on it at all. (T.R. 127, 132). The truck driver did not explain or offer to explain to the officer why he did not have a lock on the trailer hitch. (T.R. 142). The police officer told the truck driver he did not have proper equipment for pulling a trailer on the highway and the truck driver did not show him that anything was broken off. (T.R. 143, 144). The truck driver was then cited by the police officer for having unsafe equipment. (T.R. 127, 132, and 139). A bond was posted and forfeited. (T.R. 141). The law required a safety chain, officer Boyd stated. (T.R. 131). When being questioned by Mr. Wilson, one of defendants' attorneys, the officer testified:

"Q. What was there to hold it, then, Mr. Boyd?

A. That is what I would like to know.

Q. In other words, you don't know what was supposed to hold it?

A. There was supposed to be a chain and lock on it, but there was nothing on it." (T.R. 133).

The purpose of safety chains is to take care of a situation where, in case the hitch breaks in any way, it would prevent the trailer from veering to either side. (T.R. 142). Under questioning the truck driver admitted he had no safety chains on the truck. (T.R. 238).

The plaintiff George Gossnell was critically injured in that he sustained: a shattered knee, a compound comminuted fracture of the femur, broken ribs, and a skull fracture. He was left with impaired memory as a result of the skull fracture. (T.R. 61, 62, 67, and 68). He was also left with a very stiff knee. (T.R. 67). He was in a critical condition. (T.R. 146). The femur was broken in 10 different places, and he also suffered a fracture of the fibula (T.R. 148). He was in pain practically all of the time he was in the hospital at Tempe, and also had an embolism and other complications which would knock him out for eight or ten days at a time. (T.R. 62). He was in pain and uncomfortable practically all of the time up to the date of the trial which was held some 14 months after he sustained the injury. (T.R. 12, 57, and 63).

The defendants set forth on page 3 of their opening brief that the plaintiff George Gossnell was in bed in the court room throughout the trial, notwithstanding the fact that the fracture of his leg was healed. X-rays were taken on March 1, 1954, a little over a month prior to the trial (T.R. 12, 166) and revealed that he was bedridden because not enough callous had formed for the femur to bear weight. There was not sufficient solid union or healing so as to permit removal of the cast and to permit him to get up and around and return to activity. (T.R. 159, 152, 153, 167, 169, 178, 166, 169, and 171). He could not have been placed in a wheel chair with the cast on. (T.R. 176) because he was not ready for it. There was not enough healing to remove the cast. (T.R. 178). He would be laid up in bed for another year to a year and a half. (T.R. 173). Dr. Bishop called by the de-

fendant's testified that one would assume that the fracture was healed but "You can't be certain that it is". (T.R. 189).

The plaintiff George Gossnell has permanent residual effects as a result of said injuries. (T.R. 155, 171, and 172). He was bedridden from the time of the accident up to the time of the trial, except for a short interval when he was up about ten minutes at a time, and he later again became bedridden, (T.R. 57, 58, 59, 65, 66, and 67) four steel pins having been driven thru the leg attached to a steel plate for the purpose of supporting it.

The plaintiff George Gossnell had been employed by the Messenger Printing Co. of Fort Dodge, Iowa for 33 or 34 years with average annual earnings of $7,000 a year. (T.R. 60)

The plaintiff Estella Gossnell had a couple of broken ribs, injured her arm, was bruised and black and blue about her body, and received a cut under the chin. She also experienced pain in her chest, and had an Ace bandage wrapped around her for treatment of her chest and back. (T.R. 77, 100, and 101). She worked in a drapery store and was earning $150.00 per month and had not worked up to the date of the trial. (T.R. 77).

As set forth by defendants in their opening statement, they claim the truck driver drove their truck without their knowledge and consent. (T.R. 291, 292, 270 and 271).

After the accident Peter H. Siebrand, a son of one of the defendants, P. W. Siebrand, came upon the accident (T.R. 281). He helped the truck driver at the scene. (T.R. 282). He had the trailer moved to a parking lot and called up his father, one of the defendants, and told him what he had done about the trailer. (T.R. 307). P. W. Siebrand, one of the defendants, went to see the Gossnells twice at the hospital, and talked to a Mr. Clark who was a friend of the Gossnells at Mesa. Mr. Clark had gone to see P. W. Siebrand at the latter's request. (T.R. 81, and 308). The second time Defendant P. W. Siebrand went to

see the Gossnells he took his attorney and his secretary with him. (T.R. 308). He made a report to the State of the accident under the Financial Responsibility Act and did not have Willam Siebrand (who was a nephew and owner of the trailer) sign it. (T.R. 309). William Siebrand (the nephew of defendants) testified he told the truck driver to take his truck and pull his trailer. (T.R. 255). The truck driver testified he was not an employee of the defendants but was driving for William Siebrand, the nephew, and had obtained the wrong truck. (T.R. 203, 204, and 205). The nephew, William Siebrand, made no attempt to get in touch with Mr. and Mrs. Gossnell and never went near them. (T.R. 262). The truck driver told Police Officer Boyd at the scene of the accident that he was employed by Siebrand Bros. Circus and Carnival. (T.R. 126, 127, and 138). The defendant P. W. Siebrand introduced the truck driver at the hospital to Mrs. Gossnell "as the man who was driving the truck for us that day." (T.R. 81, 91, 92, and 93). P. W. Siebrand, one of the defendants, asked Mrs. Gossnell if they needed money when he visited her at the hospital, and asked her if she could drive. He said he would buy them a new car so that she could take her husband home and that he would pay all damages. (T.R. 95, 96, 97, 98, and 99). P. W. Siebrand stated to Mr. Clark, a friend of the Gossnells, at Mesa that lawyers should not be brought into the case as they could settle between themselves; that he would stand all damages; that lawyers would drag the case through the courts for several years. (T.R. 113).

The foregoing represent some of the salient facts adduced at the trial. Further pertinent facts will be developed during the course of the argument.

SUMMARY OF ARGUMENT

The plaintiffs submit that the doctorine of res ipsa loquitur was applicable to the facts involved in the case at bar, and that

the trial judge was warranted in instructing the jury with respect thereto.

It is further submitted that in view of the direct, forceful, and positive evidence given by Officer Boyd there is extreme doubt as to whether the plaintiffs need seek help and support of the doctrine of res ipsa loquitur.

Under the provisions of Arizona law it is not necessary in order to establish a master-servant relationship to show that there was a contract giving the master control of details of the work of the servant; nor to show power to hire and dismiss; nor to show provision for compensation of the servant.

The liability of the master is derivative only in those instances where he is not guilty of negligent conduct, and his liability is based solely upon the negligent conduct of the servant.

Plaintiffs urge that two separate and distinct verdicts in unequal amounts may be returned against two tortfeasers who were both active participants in two separate and distinct wrongful acts. Under such a fact situation their liability becomes a several one.

The verdict of the jury for damages was not excessive, nor was the jury actuated by partiality, passion or prejudice. The mere reference to a verdict as being excessive does not make it so unless it is clear that the verdict finds no support in the evidence; and a Federal Appelate Court is not wont to disturb the affirmance of a verdict by the trial judge.

The evidence introduced by plaintiffs relative to safety chains was not incompetent, immaterial or prejudicial, and the admission of such evidence was not error, especially in view of the conduct of opposing counsel in introducing similar evidence on cross-examination.

The statement of one partner, though made outside of the presence of the other partner, will become competent and admissable where no objection was properly made to the introduction of same, and where similar evidence was introduced by the partners through counsel.

The relation of joint adventurers is created when two or more persons combine their money, property or time in the conduct of some particular line of trade, or for some particular business deal and share in the profits. It is not essential to the creation of same that they share in the losses as well.

The trial court not only instructed the jury on the issue of joint adventure but also instructed the jury to the effect that the proof of ownership of the vehicle causing damage constitutes prima facie evidence that the driver thereof was an agent or servant of the owner. It is to be noted that the evidence quite properly supported both theories; and it was entirely correct and proper for the trial court to instruct the jury on every issue supported by the evidence.

Denial of appellant Carroll's motion for satisfaction of the judgment returned by the jury against him upon his deposit of the amount of the judgment with the court was discretionary with the trial court, and the order denying the motion was not an appealable one.

ARGUMENT

For the sake of clarity and comparison, appellees will answer appellants' arguments and propositions of law in the same order in which appellants set them forth in their briefs.

PROPOSITION OF LAW NO. I
THE DOCTRINE OF RES IPSA LOQUITUR IS APPLICABLE.

Defendants, in their brief, advance the proposition that the doctrine of res ipsa loquitur has no application where the cause of

the accident is unexplained and might have been due to one of several causes for some of which defendants are not responsible. We wholeheartedly agree that this is a correct statement of the law, but the difficulty here is that it finds no support from the facts in this case. In the case at bar plaintiffs' automobile was in its own lane of traffic (T.R. 123, 124 and 243) and the trailer, after becoming disconnected from defendants' truck, crossed over into plaintiffs' lane of traffic and the collision occurred. Plaintiffs' car was where it had a right to be and the disconnected trailer was obviously in a place where it did not belong, and wrongfully invaded the path of plaintiffs' automobile. The truck and trailer were wholly under the control of the defendants and the truck driver. One need not speculate to arrive at the conclusion that the trailer drawn by the truck of the defendants was the direct cause of the accident. There was no other cause and could be no other cause.

In the case of *U. S. v. Johnson,* 181 F 2d 877, this Court, speaking through Circuit Judge Pope, adequately covers the doctrine of res ipsa loquitur and cites as authority Wigmore on Evidence. We deem the facts therein set forth particularly applicable to the fact situation in the case at hand. The Court there stated:

> "A vehicle does not ordinarily capsize in this manner unless there has been negligence in inspection, maintenance or operation. No voluntary action on Johnson's part contributed to the injuries."

Likewise here, no action on the part of the plaintiffs Gossnell contributed to their injuries and damages. The evidence clearly does not support the view that any person or persons other than the defendants or the truck driver whom the plaintiffs contend was their agent were responsible for the accident or were in anywise a contributing cause. We invite the Court's attention to the case of *Weddle v. Loges,* 52 Calif. App. 2d. 115, 125 P. 2d. 914. In that case the defendant Loges, the employer,

and his agent Starr were engaged in towing a truck at the time plaintiff sustained injuries. A contention similar to that being made by the present defendants was apparently advanced in that case and the court there said:

> "The evidence shows that the towrope broke, of which the exact cause was a matter the defendants were in a better position to explain than plaintiff — the operation of the two cars being under the exclusive direction of Loges and his agent or employee Starr, and the accident being one which would not in the ordinary course of things occur if those having the management and control of the instrument use proper care, and with the plaintiff unable to explain the cause of the swerve of the car into the tree, or the reason for the breaking of the rope, the doctrine of res ipsa loquitur was applicable.
>
> It has been held that the doctrine of res ipsa loquitur may not be invoked where there is a divided responsibility and the negligence is in part that of a third party over whom defendant has no control. Speidel v. Lacer 2 Cal. App. 2d. 528, 38 P. 2d. 477. In the Speidel case the divided responsibility was of the defendant, an independent contractor, and plaintiff's employer; the control of the mechanical device not resting with defendant. In the present case the evidence tends to show the relationship of prinicpal and agent between Loges and Starr."

Likewise, in the case of *U. S. v. Hull,* 195 Fed. 2d. 64, the court stated:

> "The use of the Latin phrase 'res ipsa loquitur' in this connection may be unfortunate, as suggesting that some exotic doctrine is involved. It is nothing more than a case of circumstantial evidence, where plaintiff has proved enough 'to get to the jury', and where the inference of negligence, though not necessarily a required one, is a permissable one in the balance of probabilities."

To recapitulate, the doctrine of res ipsa loquitur is invoked when:

1. An instrumentality is in the exclusive control of defendant, and

2. An accident occurs which ordinarily would not occur if the one in control of the instrumentality uses due care in the operation and maintenance of that instrumentality.

3. No voluntary action on plaintiffs' part contributes to accident.

Appellees submit that the criteria for the rule has been met in the case at bar and the trial court's instruction based on res ipsa loquitur was correct in every respect.

It is further submitted that in view of the direct, forceful, and positive evidence given by Police Officer Boyd there is some doubt as to whether the plaintiffs need seek the help and support of the res ipsa loquitur doctrine. We quote directly from the record: (T.R. 133)

"Q. What was there to hold it then, Mr. Boyd?

A. That is what I would like to know.

Q. In other words, you don't know what was supposed to hold it?

A. There was supposed to be a chain and lock on it, but there was nothing on it.

Q. At the time you saw it, there was nothing to hold it at all, was there?

A. That is right."

The testimony reveals that the trailer was being used to move equipment from Phoenix to Mesa Fair, a distance of only 15 miles. (T.R. 312). When the trailer went over the end of the bridge there was a sort of a rise and right after that the trailer suddenly veered to the left into the Gossnell car. (T.R. 122, 123, and 124). The jury had every right to infer from these facts that the trailer was not made secure to the ball of the trailer hitch on the truck and that when the trailer went over this rise in the

bridge it caused it to become disconnected. It had the right to infer that no proper precautions were taken to make the trailer more secure because of the short haul involved.

PROPOSITION OF LAW NO. 2.

UNDER ARIZONA LAW IT IS NOT NECESSARY IN ORDER TO ESTABLISH A MASTER-SERVANT RELATIONSHIP TO SHOW THAT THERE WAS A CONTRACT GIVING THE MASTER CONTROL OF DETAILS OF THE WORK OF THE SERVANT; NOR TO SHOW POWER TO HIRE AND DISMISS; NOR TO SHOW PROVISION FOR COMPENSATION OF THE SERVANT.

This contention on the part of the appellants is quite summarily disposed of by the case of *Baker v. Maseeh,* 20 Ariz 201, 179 Pac. 53. which is still the law in Arizona.

The undisputed evidence in the record reveals that the defendants were the owners of the truck used by the truck driver in towing the trailer in question. (T.R. 103, 204, 255, 270, 291, and 292).

In *Baker v. Maseeh,* supra, the court laid down the following rule:

> "When plaintiff has suffered injury from the negligent management of a vehicle....., it is sufficient prima facie evidence that the negligence was imputable to the defendant to show that he was the owner of the thing without proving affirmatively that the person in charge was the defendant's servant. It lies with the defendant to show that the person in charge was not his servant, leaving him to show, if he can, that the property was not under his control at the time and that the accident was occasioned by the fault of a stranger, an independent contractor or other person for whose negligence the owner would not be answerable."

The Court further stated:

"One who is damaged, either in person or in property, by an automobile negligently operated by some person other than the owner, is usually without information as to the relation between the driver and the owner. If he be required to make affirmative proof of the relation, he might never be able to do so, however just and meritorious a case he might have on account of the negligent operation of the vehicle.

".....we hold that proof of ownership is prima facie evidence that the driver of a vehicle causing damage by its negligent operation is the servant or agent of the owner and using the vehicle in the business of the owner."

The court there further pointed out that it is not necessary to prove that such party was being compensated at the time in question. It was stated

"It is not essential that the agency presumed from proof of ownership should be a business agency, or the service a remunerative service."

During the course of the trial the defendants Siebrand vigorously denied that there was any relationship between them and the truck driver. (T.R. 270, 290, and 292). Notwithstanding these denials on the part of the defendants, there was one piece of physical evidence, which proved very damaging to the defendants, and which must of necessity have a profound effect on the jury in finding against the defendants on this particular issue. The testimony of the defendants revealed that while there were concessions owned by others which composed a portion of their circus and carnival, the rides in the show were owned exclusively by defendants Siebrand and under their exclusive control, and that William Siebrand, their nephew, had no connection with these rides. (T.R. 103, 104). *Police Officer Boyd testified that at the scene of the accident he observed what was inside of the trailer through a hole that had been torn in the trailer.* (T.R. 142) *and he stated that he observed rides equipment in the inner portion thereof.* His testimony to the effect that there was a hole torn in the trailer was corroborated by one of the defendants'

own witnesses, William Siebrand. (T.R. 251, and 252). This testimony revealed to the jury that the trailer in question, while it may have belonged to the nephew of the defendants, William Siebrand, was being used to transport equipment belonging to the defendants, and was being towed by one of defendants' trucks which the undisputed testimony offered by both sides reveals was driven by truck driver Carroll. This fact would quite clearly beyond any doubt whatsoever, conclusively establish that the truck driver at the particular time in question was acting for and on behalf of the defendants.

The court in the case of *Baker v. Maseeh,* supra, stated, concerning the duty of a defendant in a situation of this kind:

> "The presumption of use and control arising from proof of ownership is not conclusive. It has the effect, however, to cast the burden of proof on the owner to show, if he can, that the negligent driver was not his servant or agent, or, if such servant or agent, he was not at the time using the vehicle in the business of the owner."

The defendants apparently did not meet this burden to the satisfaction of the jury.

The defendants in their brief (page 24) attack other evidence which tended to establish an agency relationship between the truck driver and the defendants on the ground that such evidence was incompetent. We specifically refer to the statement made by the defendant P. W. Siebrand to Mrs. Gossnell at the hospital to the effect that the truck driver was the man who was driving the truck for them that day. While counsel for the defendants first objected to any such testimony upon direct examination, he went into it very fully and developed it very thoroughly on cross-examination in at least three instances. (T.R. 91, 92, and 93). The same holds true with respect to the statement made by officer Boyd to the effect that the truck driver informed him that he was employed by Siebrand Brothers Circus and Carnival. While counsel for the defendant objected to the testimony in the

first instance (T.R. 126) he again developed it himself on cross-examination (T.R. 138) and his clients thus became bound by such testimony.

PROPOSITION OF LAW NO. 3

THE LIABILITY OF THE MASTER IS DERIVATIVE WHERE HE HIMSELF IS NOT GUILTY OF NEGLIGENT CONDUCT AND THE LIABILITY OR THE MASTER IS BASED SOLELY UPON THE NEGLIGENT CONDUCT OF THE SERVANT.

The contention of defendants that the liability of the master is limited to the amount recovered against the servant holds true where the master's liability is entirely derivative, that is to say, when it stems entirely from the acts of the servant and the master is not himself an active tortfeaser. We most wholeheartedly concur that this is a correct rule of law. That the result is otherwise, where the master is an active participant, is quite clearly pointed out by the Arizona Supreme Court in the case of *DeGraff v. Smith,* 62 Ariz. 261, 157 P. 2d. 342 where the court said:

> " 'Nor does the verdict in favor of a joined servant bar a recovery against the master where the latter has himself been guilty of acts on which independently of the acts of the servant, liability may be predicated'. There is no evidence in the case that the defendant DeGraff was guilty of an act of negligence on which, independently of the acts of the servant, liability may be predicated."

The question now posed in this case is this: were the defendants guilty of any independent negligent act, other than that arising from the conduct on the part of the truck driver? In analyzing the situation it is to be noted that the plaintiffs in their amended complaint allege two separate delicts. (T.R. 3 and 4). In the complaint it is alleged:

> "On February 20, 1953, while plaintiffs were proceeding in their automobile in a northerly direction on the Tempe Bridge just north of the business district of Tempe, Arizona, defend-

ants so negligently, carelessly and wantonly MAINTAINED AND OPERATED their motor vehicle and heavily loaded trailer attached thereto, so as to cause said trailer to become disconnected, and run into the automobile of plaintiffs with great force and violence."

The two wrongs charged are failure to maintain and to operate properly. It is significant to note that defendants try to read a distorted meaning into the above paragraph of plaintiffs' complaint. They assert that the words "maintain and operate" are synonymous and therefore apply only to the defendant truck driver. It is clear that the complaint alleges two distinct acts of negligence since it is utter folly to urge that there was any attendant duty on the truck driver in the instant case to maintain the equipment. In this connection the Court's attention is invited to the case of *Morris v. American Liability Surety Company,* 185 Atl. 201; 322 Pa. 91. In that case, the Pennsylvania Supreme Court said that the word "maintain" means to preserve or keep in an existing state or condition, and embraces acts to prevent a decline, lapse or cessation from that state or condition, and has been taken to be synonymous with "repair."

Defendants had a duty to maintain the equipment in a good state of repair and to provide adequate safety measures so that the accident in question would not have happened. With this duty they alone are charged and a violation of this duty in the instant case caused the plaintiffs to incur the loss that occasioned this action. For a violation of this duty, the trial court saw fit to deny defendants' motion for a new trial on the basis that there was no negligence shown. It is fundamental that the appellate court will not substitute its judgment for that of the trial court where there is evidence to support the denial of a motion for a new trial.

PROPOSITION OF LAW NO. 4.

SEPARATE AND DISTINCT VERDICTS IN UNEQUAL AMOUNTS MAY BE RETURNED AGAINST TORTFEASORS

WHO ARE ACTIVE PARTICIPANTS WHERE TWO SEPARATE WRONGFUL ACTS ARE INVOLVED. IN SUCH A SITUATION THEIR LIABILITY IS SEVERAL.

In support of this proposition of law the defendants contend that they were not active participants in the wrong resulting in damages to plaintiffs. They state on pages (3, and 4) of their brief:

> "The only possible theory upon which the defendants Siebrand could be designated joint tort-feasors is that they were negligent in failing to inspect the trailer-hitch on the truck and trailer."

The undisputed evidence reveals further negligence on the part of the defendants Siebrand. They are admitted owners of the truck that was pulling the trailer in question. (T.R. 103, 204, 255, 270, 291, and 292). The truck driver who was called as a witness in their behalf admitted that there were no safety chains on the truck in question. (T.R. 238). Officer Boyd cited the truck driver for having unsafe equipment on the highway, and a bond was posted and forfeited. (T.R. 127, 132, 139, and 141).

In addition to the foregoing direct evidence the plaintiffs have the assistance of the doctrine of res ipsa loquitur. As this Court stated in the case of *U. S. v. Johnson,* supra:

> "A vehicle does not ordinarily capsize in this manner unless there had been negligence in inspection, maintenance or operation."

The trial Court in this case properly instructed the jury as follows on this particular point: (T.R. 319).

> "The section of the Arizona Code provides as follows:
>
> "No person shall drive or move on any highway any motor vehicle, trailer, semi-trailer, or pole trailer, or any combination thereof, unless the equipment upon any and every said vehicle is in good working order and adjustment as required

by this section, AND SAID VEHICLE IS IN SUCH SAFE MECHANICAL CONDITION AS NOT TO ENDANGER THE DRIVER OR OTHER OCCUPANT, OR ANY PERSON UPON THE HIGHWAY." (Emphasis Supplied)
Ariz. Code. Annotated 1939, 1952 Cum. Supp., Sec. 66-183.

It is elementary that had the truck in question been equipped with proper safety chains the accident in question could have been avoided.

The defendants further assert that the plaintiffs did not allege negligence on the part of the defendants in their complaint. This contention was disposed of in reply to Proposition of Law No. 3.

The defendants in their brief cite many cases in support of the general rule that a judgment against joint tort-feasors must be one judgment and cannot be apportioned. *We concur that such is the law where only one distinct wrong is involved, and in a situation where only one single verdict is submitted to the jury in which it may return a verdict to compensate plaintiffs for such wrong. This is not the situation in the case at bar, inasmuch as in the instant case, two separate and distinct verdicts were submitted, and quite properly so, because of the separate and distinct acts of negligence involved and because the defendants were severally liable.* In support thereof, plaintiffs cite the case of *Bigelow v. Old Dominion Copper Mining & Smelting Co.,* 225 U. S. 111; 56 L. Ed. 1009; 32 S. Ct. 641, which appears to bulwark the legal authorities touching upon the particular points involved. The court there in a very thorough and comprehensive opinion, in part stated as follows:

"The common law imposes upon each joint tort-feasor the burden of bearing the entire loss which he, in co-operation with another, has inflicted. The injured person may sue those who co-operated in the commission of the tort together, or he may sue them singly. He may recover against less than all if he sue them jointly, AND MAY HAVE JUDGMENT FOR UNEQUAL SUMS AGAINST ALL WHO ARE JOINED IN THE SUIT. Or, if he sue one such wrongdoer and he recover

judgment, he is not estopped from suing another upon the same facts unless his first judgment has been fully satisfied. Lovejoy v. Murray, 3 Wall. 1; 18 L. Ed. 129; Sessions v. Johnson, 95 U.S. 347, 348; 24 L Ed. 596, 597; The Beacons Field, 158 U.S. 303; 39 L. Ed. 993; 15 Sup. Ct. Rep. 860."

It is to be noted that although the decision in the *Old Dominion* case, supra, was handed down approximately forty years ago, it is still law and was cited in *Johnson v. Pullman Co.,* 200 Fed. 2d. 751, a 1953 decision.

Attention is further invited to the fact that Arizona has a statute squarely covering the matter, to-wit:

"21-1220. Joint or several judgment.....
When two (2) or more are sued as joint defendants judgment may be given against those as to whom the cause of action is proved; *when a several judgment is proper, judgment may be given for or against one (1) or more of the defendants.*" (Emphasis Supplied)

Attention is further invited to the fact that the defendants P. W. and Hiko Siebrand and the defendant S. J. Carroll each interposed separate answers and interposed entirely different defenses. (T.R. 6, and 7). The former interposed the defense that S. J. Carroll was not their agent, and denied that the truck and trailer were being operated with their consent or that they were engaged in a joint venture. Nor did the defendant S. J. Carroll DENY THAT HE ACTED AS AGENT OR SERVANT of the Siebrands, his main defense being that the accident was an unavoidable one insofar as he was concerned. The jury could very well under the evidence have concluded that there was little or no fault on the part of Carroll, the truck driver, and that if the defendants P. W. and Hiko Siebrand had not permitted the defective equipment to be operated on the highway, the accident in question would never have occurred.

If it were assumed, for the purpose of argument only, that there were any irregularity in the verdicts submitted, the de-

fendants are too late to take advantage thereof after a verdict has been recorded and judgment has been entered theron. In *Flush v. Erie Ry Co.,* 110 F. Supp. 118, the court said:

> "For had General Motors then raised any question as to the meaning of the special verdict or its possible inconsistency, the jury's intent would have been lawfully and promptly ascertained by the court, as intimated, before the verdict was formally received. Were this intent of the jury then found to be unlawful, as inconsistent, as General Motors now contends, the jury's attention would have been called thereto, the pertinent law explained, and such tentative error doubtless promptly corrected.....such party can hardly rely on a mere ambiguity in the verdict, as a basis for nullifying a trial.....with the consequent waste of time and money of all concerned, particularly in the light of the rule that a jury's verdict is to be sustained, in the absence of irreconcilable conflict."

In the case at bar, the trial Judge, while instructing the jury on April 16, 1954, instructed them further that they could bring in two possible verdicts, one for or against the defendants Siebrand and one for or against the truck driver. (T.R. 328). After the jury had retired to deliberate on its verdict, the District Judge stated (T.R. 329), "You may state your objections to the instructions, gentlemen". At that time, counsel for the defendants P. W. and Hiko Siebrand made certain objections to instructions given and instructions refused by the District Judge. Counsel for the defendants P. W. and Hiko Siebrand did not at that time, when offered an opportunity to object to the form of the verdicts, make any attempt to interject an objection thereto. Counsel for the defendant Carroll, joined in all of the objections made by counsel for the Siebrands. (T.R. 328, 329 and 330). After the jury deliberated and returned their verdicts on April 16, 1954 (T.R. 18 and 19), the verdicts were read and recorded by the Clerk of Court and no poll was desired by either side and the jury discharged. Counsel for the plaintiff moved for judgment on the verdicts and it was duly entered, and counsel for defendants Siebrand made a motion for stay of execution of the

judgment. At no time after the submission of the verdicts to the jury and after the rendition of the verdicts was an objection made by counsel with respect to the alleged inconsistency of such verdicts. Appellants first raised this question on motion for new trial dated April 26, 1954, which was ten days after the rendition of the verdicts and this motion was argued before the District Court on May 17th, one month after the rendition of the verdict.

Appellees assert that by inviting error at the trial and at time of rendition of the verdicts, appellants have waived their right to bring this matter before the Court of Appeals. In support thereof, we quote from 3 Am Jur, Sec 393:

> "An objection to the formal sufficiency of a verdict comes too late for consideration on review when not made until after the jury has been discharged, when it is too late for correction."

The trend of the more recent decisions is to give effect to the true intent of the jury. The defendants P. W. and Hiko Siebrand here attempt to distort, alter, and torture the intent of the jury by limiting the toal damages to a sum of one hundred dollars ($100.00), a perfectly ridiculous conclusion in view of the serious nature of the personal injuries and the large resulting monetary loss to the plaintiffs, more especially to the plaintiff, George Gossnell. *In Flush v. Erie Ry. Co.,* supra, a Federal decision where the defendants attacked a verdict claiming it was inconsistent because the jury found against two defendants in one verdict but found in favor of one defendant on its cross-claim, the court held in sustaining the verdict:

> "Because of the obvious difficulty attendant upon any attempt to ascertain the true intent of a jury.....the rule must be borne in mind that every reasonable intendment must be indulged in to support a verdict, the two findings must be in irreconcilable conflict before they may be set aside. Theurer v. Co. 124 Fed. 2d. 494; Bass v. Dehner, 103 Fed. 2d. 28, 34; 5 Moore's Fed. Practice Sec. 49.04. P. 2211 (2nd Ed. 1951)."

It is to be noted that the Siebrands and the truck driver, from the very inception of this case, adopted two different theories, made two different answers, employed two different attorneys and asked for two separate verdicts. They cannot now be heard to complain.

PROPOSITION OF LAW NO. 5

THE VERDICT OF THE JURY FOR DAMAGES IS NOT EXCESSIVE, NOR WAS THE JURY ACTUATED BY PARTIALITY, PASSION OR PREJUDICE.

Defendants assert with respect to this proposition of law that the damages rendered against them were so unreasonable that the jury was actuated by passion and prejudice. Merely stating that a verdict is excessive does not make it so, nor is the size of the verdict alone evidence of passion and prejudice and the Arizona Supreme Court has so indicated. *Keen v. Clarkson,* 56 Ariz 437, 108 P.2d. 573.

The defendants lay great stress on the case of *Stallcup v. Rathbun,* 76 Ariz. 62; 258 P. 2d. 821. It should be noted that the special damages in that case in the way of medical expenses were only $5,380.80 in comparison with those in the present case which run in excess of $24,000 dollars as will hereafter more particularly appear. Further, in the *Stallcup case,* the trial judge ordered a remittitur. In the case at bar, the trial judge was also called upon at the motion for a new trial to grant such motion on the claimed ground of excessiveness of the verdict. This the trial judge refused to do and also refused to allow a remittitur in lieu of a new trial. The identical question posed in this appellate court was brought before the trial judge who had an opportunity to see and hear the witnesses. In his discretion, the trial judge refused to reduce the amount awarded plaintiffs against defendants.

The plaintiff George Gossnell was critically injured in that he sustained: a shattered knee, a compound comminuted fracture of

the femur, broken ribs, and a skull fracture. He was left with impaired memory as a result of the skull fracture. (T.R. 61, 62, 67, and 68). He was also left with a very stiff knee. (T.R. 67). He was in a critical condition. (T.R. 146). The femur was broken in 10 different places, and he also suffered a fracture of the fibula (T.R. 148). He was in pain practically all of the time he was in the hospital at Tempe, and also had an embolism and other complications which would knock him out for eight or ten days at a time. (T. R. 62). He was in pain and uncomfortable practically all of the time up to the date of the trial which was held some 14 months after he sustained the injury. (T.R. 12, 57, and 63) and was bedridden all of that time (T.R. 159, 152, 153, 167, 169, 178, 166, 169, and 171) and would continue to be for another year to a year and a half. (T.R. 173).

It would appear from the evidence introduced at the trial that, up to the period of time that the plaintiff George Gossnell had concluded with his medical treatment, a list of the special damages for both Mr. and Mrs. Gossnell would be as follows:

Medical expenses to date of trial	$12,027.00
Damages to Automobile	1,474.00
Loss of wages for both Mr. and Mrs. Gossnell to date of trial	8,800.00
Loss of another year's wages for Mr. Gossnell during year or year and a half he would continue to be bedridden subsequent to date of trial	7,000.00
Medical expense for another year to year and one half that he would continue to be bedridden.	12,000.00
Total	$41,301.00

Let it be further assumed that a minimum of $15,000 was allowed by the jury for pain and suffering, which figure would be

conservative to say the least in view of Mr. Gossnell's long confinement, and the future confinement and pain and suffering he will have to endure. When the foregoing figure of $15,000 for pain and suffering both past and future is added to the figure of $41,301.00, representing the special damages, a sum total of $56,301.00 is arrived at. This leaves a remaining balance of $38,709.00 to be applied toward compensation for the permanent injury Mr. Gosnell sustained and future loss of wages and earning power. It is further to be noted that these damages were in part to compensate Mrs. Gossnell for her injuries. It will be recalled that it appeared from the mortality tables introduced at the trial that Mr. Gosnell had a life expectancy of 11 and some tenths years. (T.R. 182). If it were assumed that he would work for the entire 11 years he would earn $77,000.00 in that his average annual earnings were $7,000 per year (T.R. 60). The jury in arriving at its verdict apparently in awarding him a remaining sum of $38,699.00 felt that it was all together fitting and proper to award him one half of the amount of what his total future earnings based on a life expectancy of 11 years would be. This sum would also have to compensate him for permanent injury, and future medical attention beyond the year or year and one half. Such an award it would appear was all together fitting and proper in view of the circumstances and therefore the trial court refused to disturb it. Was this an abuse of discretion? Appellees think not, when all of the facts are taken into consideration.

The following authorities are submitted in support of the verdict:

Back in the year of 1935 an award of $76,112 was held not excessive for injuries to legs and other parts of body of a man sixty-one years of age whose medical expenses were $16,112.00.

Fulton v. Co. (Mont.) 37 P. 2d. 1025

In a 1953 Federal decision *O'Donnell v. Great Northern Ry.,* 109 F. Supp. 590, where plaintiff had an expectancy of 16 years

and future earning could have been found to be $50,000, medical expenses were $3,431.81, loss of earnings were $8,925.00 an award of $65,000 was held not excessive.

In *Flush v. Erie R. Co.,* 110 F. Supp. 118, the court quite aptly stated:

> "It would serve no useful purpose to cite authorities on damages, though it must, of course, be borne in mind that the dollar today is worth but half what it was a score of years ago."

The court in the *Flush* case awarded $30,000 for a skull fracture which is merely one of the injuries involved in the case at bar stating:

> "There is no total, or even substantial, disability which really affected plaintiff's earning a livelihood or even his domestic life."

In *Kieffer v. Blue Seal Chem. Co.* 107 F. Supp. 228, affirmed in 96 Fed. 2d. 614, an award of damages in the sum of $250,000 for injuries resulting in permanent loss of earning capacity was held not so irresistibly excessive so as to give rise to the inference of passion and prejudice, or mistake on the part of the jury and the award was affirmed.

The Federal courts have time and again stated that an award of damages for personal injuries enjoys a large presumption of correctness. *In re Central Railroad of New Jersey,* 52 F. 2d. 20; and more emphatically have stated that the grant or denial of a new trial on the ground of excessive damage is a matter of discretion with the trial court and not a subject for review.

United States Supreme Court — *New York L. E. and W. R. Co. v. Winter's Adm'r.,* 125 S. Ct. 356, 143 U. S. 60; *Chesapeake & Ohio Ry. Co. v. Proffitt,* 36 S. Ct. 620, 241 U. S. 462. See also *Washington Times Co. v. Banner,* 86 F. 2d. 836, *Arizona & N. M. Ry. Co. v. Clark,* 207 F. 817, 125 C. C. A. 305;

affirmed, 35 S. Ct. 210; 235 U. S. 669. *Chicago E. & I. Ry Co. v. Devine,* 39 F. 2d. 537.

This Court has said it will not replace its inferences for those of the jury on the question of damages. *Sears Roebuck & Co. v. Hartley,* 160 F 2d 1019. See also *Consumers Power Co. v. Nash,* 164 F. 2d. 657, wherein the court of appeals stated that the District Court on motion for new trial should determine if the verdict was excessive and not the Circuit Court of Appeals.

It is respectfully submitted, that for the reasons hereinabove set forth the award of damages made by the jury in the instant case should be affirmed.

PROPOSITION OF LAW NO. 6

NO INCOMPETENT, IMMATERIAL OR PREJUDICIAL EVIDENCE WAS ADMITTED TO THE PREJUDICE OF ANY PARTY.

In support of this proposition defendants contend that the laws of the State of Arizona do not require the use of safety chains on trucks pulling trailers. It is obvious that by advancing such contention the defendants must be completely oblivious of Section 66-183. Ariz Code of 1952 Cum Supp. which provides:

> "No person shall drive or move on any highway any motor vehicle, trailer, semi-trailer, or pole trailer, or any combination thereof, unless the equipment upon any and every said vehicle is in good working order and adjustment as required by this section, and said vehicle is in such safe mechanical condition as not to endanger the driver or other occupant, or any person upon the highway."

As heretofore stated the truck driver was cited by Officer Boyd for having unsafe equipment. (T.R. 127, 132, and 139). The law required a safety chain, Officer Boyd stated. (T.R. 131). The purpose of safety chains is to take care of a situation where in case

the hitch breaks in any way, it would prevent the trailer from veering to either side. (T.R. 142).

It is to be further noted that the trial Judge gave an instruction based upon the evidence adduced at the trial which is substantially the foregoing section of the Arizona Code. (T.R. 319).

On page 43 of their opening brief defendants assign as error the evidence given by the truck driver relative to safety chains. Prior to the admission of this evidence counsel for both the defendants Siebrands and the truck driver very thoroughly cross-examined Officer Boyd on the matter of safety chains. Mr. Gibbons, attorney for the truck driver asked: (T.R. 131).

"Q. You said there were no safety chains there, is that right?

A. That is right."

The cross-examination was continued by Mr. Gibbons. (T.R. 131, 132, and 133).

Mr. Wilson, counsel for the defendants, himself put questions to the officer relative to safety chains. (T.R. 140).

Counsel for the plaintiffs also questioned the officer relative to safety chains as follows: (All without objection from defendants' counsel T.R. 127).

"Q. And what did you find, or what did your examination of that equipment reveal?

A. I found that there was no safety chain, and there was no lock for the ball hitch at all on the trailer."

At no time during this colloquy did defendants' counsel, Mr. Wilson, object to the introduction of such evidence.

Appellees submit that in any event, the answers given and the questions asked were not prejudicial but provided another link

in the chain of evidence to show the negligence of defendants P. W. and Hiko Siebrand in failing to provide adequate safety measures which failure led to the accident in question.

Suffice it to say that appellants waived their right to raise this question in the appellate court by their own inaction (assuming for the purpose of argument it was inadmissible, which plaintiffs deny) and consent in the trial court. See 3 Am. Jur., Sec. 872, page 417 et seq.

PROPOSITION OF LAW NO. 7

STATEMENT OF ONE PARTNER THOUGH MADE OUTSIDE OF PRESENCE OF OTHER PARTNER WILL BECOME COMPETENT WHERE NO OBJECTION IS MADE TO SAME AND SIMILAR EVIDENCE IS INTRODUCED BY THE PARTNERS.

Defendants urge as error evidence relating to the conversation which took place between Fred Clark and P. W. Siebrand two days after the accident in question. Mr. Clark testified through depostion that P. W. Siebrand stated he would pay all damages, and buy the plaintiffs a new car. (T.R. 112). Here again defendants by their own conduct prior to the admission of such evidence brought out these identical facts for which they now claim error. Cross-examination of Mrs. Gossnell by Mr. Wilson (T.R. 98) was as follows:

"Q. I will ask you if Mr. Clark said to you when he returned from seeing Mr. Siebrand that he said to Mr. Siebrand:

'I understand you wish to see me.'

And that Mr. Siebrand had said to him, 'I do.' And that he said, 'And I am so sorry about this accident.'

And that he told Mr. Siebrand that Mrs. Gossnell had said that Mr. Siebrand wanted to see him. And that Mr. Siebrand said he was so very sorry about the accident, and

that he was going to stand all damages, and would buy them a new car at once, because theirs was wrecked beyond repair.

Didn't he tell you that when he came back from Mesa?

"A. I think he told my husband.

"Q. I don't care about that. Did he tell you?

"A. I don't remember whether he told me or not."

Furthermore, Mr. Breen the attorney for the defendants upon the taking of the deposition of the witness Clark, while he objected to the admission of this same testimony in the first instance brought the very same out again upon his cross-examination of Clark (T.R. 117) as follows:

"Q. And how he was going to replace the car, or who was going to do about damages, or who was going to pay for them, he didn't say?

A. He said he would take care of the damages. He said, "I will take care of all damages and will replace the car at once. And if you wish me to say, he further said, "I hope we don't get lawyers into the case because it will drag through the courts for several years."

The defendants further urge prejudicial error as to the statement made by P. W. Siebrand on the occasion when the truck driver and he came to see Mrs. Gossnell at the hospital a day or so after the accident. On that occasion the testimony reveals that Mr. Siebrand introduced the truck driver as the man who was driving the truck for him that day. Mr. Wilson counsel for the defendants again introduced this same evidence and developed it again upon cross-examination of Mrs. Gossnell (T.R. 91) as follows:

"Q. A while ago your counsel asked you if Mr. Siebrand came there with Mr. Carroll, and then you reiterated some conversation that Mr. Siebrand made with you while he was there.

Would you tell us again what that was?

A. Mr. Siebrand introduced me to Mr. Carroll and said, "This is Mr. Carroll, the man who was driving the truck for us that day, and I brought him over to see you."

This was gone into again by defendants' counsel. (T.R. 92). 3 Am. Jur., Section 873, states unequivocally that:

"The right to complain of error in the admission of evidence bay be waived, also, by introducing similar evidence in opposition."

The *Am. Jur.* citation above referred to cites a host of cases in support of this rule of law.

Also at 3 *Am. Jur.,* Section 879, page 430, the often expressed rule on this point is quoted:

"An appellant cannot complain of error in the admission of evidence which he himself offered or drew out."

PROPOSITION OF LAW NO. 8

THE RELATION OF JOINT ADVENTURERS IS CREATED WHEN TWO OR MORE PERSONS COMBINE THEIR MONEY, PROPERTY OR TIME IN THE CONDUCT OF SOME PARTICULAR LINE OF TRADE, OR FOR SOME PARTICULAR BUSINESS DEAL AND SHARE IN THE PROFITS.

Defendants in this proposition of law attempt to discredit the court's instructions on the liability of joint adventurers. In doing so, they cite the case of *Gottlieb Bros., Inc. v. Colbertson,* 152 Wash. 205, 277 P. 447, to support their contention that the joint adventurers must share in the losses as well as the profits of the enterprise. That case is in no wise connected with tort liability of a joint adventurer, but the theory set forth is in contract. Appellants also quote 30 *Am. Jur.,* page 682, Section 12, to the effect that at common law joint adventurers share in both profits and losses. We call the Court's attention to this same authority, Volume 30 *Am. Jur.,* page 682, Section 12, where it is stated:

"There is authority, however, that the sharing of losses is not essential, or at least, that there need not be a specific agreement to share the losses, and that if the nature of the undertaking is such that no losses occur, an agreement to divide the profits may suffice to stamp it as a joint adventure, although nothing is said about sharing losses."

At page 47 of their brief defendants state:

"It has been declared that at common law, in order to constitute a joint adventure, there must be an agreement to share in both the profits and the losses."

It should be particularly noted that such a definition could not be considered satisfactory or adequate because the common law did not recognize the relationship of co-adventurer. *O. K. Boiler and Welding Co. v. Minnetonka Lumber Co.* (Okl.), 229 Pac. 1045.

The question arises did the jury have a right to infer from the evidence presented that the defendants, P. W. & Hiko Siebrand, and their nephew, William Siebrand, were joint adventurers? The facts revealed that the defendants were the owners of the truck in question. (T.R. 103, 204, 255, 270, 291, and 292) and that William Siebrand was the owner of the trailer, (T.R. 248). The testimony further revealed that the trailer, although same was owned by the nephew William Siebrand, contained rides equipment. (T.R. 142). The testimony further revealed that the defendants Siebrand were the only owners of the rides (T.R. 103, 104). It would thus appear that they were engaged in promoting an enterprise together and for their mutual benefit, and to that end were acting in concert. William Siebrand further had a sign painted on the side of the trailer which read: "Siebrand Brothers Carnival and Circus." (T.R. 256). So from this entire picture the jury had a right to infer and make proper inferences for either party, and they apparently resolved same in favor of the plaintiffs.

Defendants also make much of the fact that the payments by William Siebrand to the defendants should be termed "rent" as

distinquished from "profits". This again upon the whole evidence was a question of fact for the jury which it again resolved in favor of the plaintiffs.

The rest of defendants' assignment of error is based primarily on the proposition that the trial court incorrectly instructed the jury as to what constituted a joint adventure. Appellants' main point is to the effect that a correct definition was not included in that the element of "losses" was left out of the instructions relating to joint adventure. As plaintiffs have heretofore pointed out, the fact that a joint adventure includes no agreement to share losses is not essential.

A reading of all the instructions submitted to the jury will readily reveal that the trial judge in the instant case was careful to give to the jury all the necessary rules of law applicable in order for them to arrive at a verdict based upon the evidence.

The test of correctness of the instructions submitted to the jury, is whether upon the whole charge the jury will gather the proper rules to be applied in arriving at a correct decision. *Greyhound Lines v. Zane,* 160 F. 2d. 731; *Woodward v. U. S.,* 167 F. 2d. 774.

More emphatically, it can be stated that if the instructions as a whole substantially and correctly cover the law applicable to the issues, and if the law has been fairly and correctly presented, a judgment will not be reversed on appeal even though the instruction may be open to criticism. *Magee v. Fasulis,* 65 Cal. App. 2d. 94; 150 P. 2d. 281.

It is also very important to note that the court not only instructed the jury on the issue of joint adventure but also instructed the jury to the effect that proof of ownership of the vehicle causing damage constituted prima facie evidence that the driver thereof was an agent or servant of the owner, and as such was presumed to be using same in the business of the owner. (T.R. 322). The court further instructed the jury that the creation of an agency relationship could arise from the consent of the parties; and that

it was not essential that any actual contract should exist, or that compensation should be expected by the agent, and that the assent of the parties thereto may be express or implied. (T.R. 323). The court further instructed the jury that the burden of proof is cast on the owner to show, if he can, the negligent driver was not his agent or servant (T.R. 324).

It will thus be seen that the court not only instructed the jury on the joint adventure theory but also upon the agency theory, the latter springing from the fact that the defendants were the admitted owners of the truck which was being driven by the truck driver at the time of the accident. *Baker v. Maseeh,* supra.

It is to be further noted that the evidence quite readily supported both theories and it was entirely correct and proper for the trial court to instruct the jury on every issue supported by the evidence.

Plaintiffs submit to the Court that defendants were not prejudiced by the instructions given to the jury by the trial court when all the instructions are read as a whole, and that there was no resulting prejudicial error.

PROPOSITION OF LAW NO. 9 OF APPELLANTS SIEBRAND
PROPOSITION OF LAW NO. 1 OF APPELLANT S. J. CARROLL
DENIAL OF MOTION FOR THE SATISFACTION OF JUDGMENT IS NOT APPEALABLE

Both appellants Siebrand and Carroll would have this court declare that the trial court erred in refusing to grant the appellant Carroll's motion for satisfaction of judgment. This is nothing more than saying that the trial court has no discretion in the matter. With this plaintiffs disagree.

Appellants novel approach on this question presents no ground for appeal in any event.

In *Topeka Morris Plan Co. v. Hill,* 148 Kan. 295; 80 P. 2d. 1049, the trial court denied defendants motion for satisfaction of judgment pursuant to a statute of Kansas. The appellate court stated that this was solely within the trial court's discretion and presented nothing open to appellate review. As plaintiffs later point out, this is also the Federal rule.

Significantly, appellants Siebrand in their motion for new trial, did not raise this question of satisfaction of judgment. (T.R. 44).

Appellant Carroll did not institute a motion for new trial, but instead made a motion for satisfaction of judgment. (T.R. 46).

Rulings upon motions to require the court to satisfy a judgment of record after payment of the judgment into court by the movant are not subject to appeal. Judicial Code Section 128, 28 USCA, Section 225, now section 1291 et seq. In particular, we quote from *Hatzenbuhler v. Talbot,* 132 F. 2d. 192, where 7th Circuit Court of Appeals was asked to rule on this identical issue and we quote therefrom:

> "At the very outset we are confronted with the question of whether this was a final judgment from which appeal lies to this court. We have only such appellate jurisdiction as Congress has granted us. By 28 U. S. C. A. Sec. 225, it is provided that we shall have jurisdiction to review by appeal final decisions of the District Courts of this Circuit. If the order in question is not a final decision, we have no jurisdiction."

> "This action of the court on the motion in the case at bar is not the final determination of the rights of the parties to have this judgment satisfied. The motion might be renewed at any time. In the instant case, nothing was settled except the particular motion then before the court."

> "It seems clear that the order appealed from was not a final decision within the meaning of 28 U. S. C. A. Sec. 225. The appeal is dismissed for want of jurisdiction."

Appellant Carroll's specification of error Number 1 on page 3 of his brief states "The Court erred in denying the motion of the truck driver Carroll for satisfaction of judgment, after Carroll had paid the full amount of the judgment against him into court-----"

Appellants Siebrand made the identical specification of error. Their Specification of error is Number XVII on page 17 of their brief.

It is quite evident from the record, that this order appealed from was not a final decision within the meaning of 28 U. S. C. A. 225 and therefore both appellants Siebrand and Carroll cannot invoke the jurisdiction of this appellate Court.

Section 225 herein referred to can now be found in 28 U. S. C. A. Sec. 1291 et seq. Plaintiffs, however, refer to Sec. 225 as it appeared in the *Hatzenbuhler* case, supra.

The principle stated in the *Hatzenbuhler* case was reiterated in *Jareki v. Whetstone,* 192 F. 2d. 121.

Appellees respectfully submit that appellants Siebrand's Proposition of Law No. 9 and appellant Carroll's appeal are not such orders within the meaning of 28 U. S. C. A. 1291, in that they are not final orders.

Not being a final order, appellant Carroll's appeal should be dismissed and defendants Siebrand's proposition of law number 9 should be stricken.

CONCLUSION

Plaintiffs George and Estella Gossnell respectfully point out to this Court that defendants have had a fair and impartial trial on all the issues submitted. Defendants have been found to be in fact and in law guilty of negligence proximately resulting in this grave misfortune from which plaintiff George Gossnell suffered and

continues to suffer. Therefore, they respectfully pray that the judgment of the District Court of Arizona be affirmed in every respect.

RESPECTFULLY SUBMITTED,

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